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No.

IN THE

Supreme Court of the United States

EDGAR MORALES, LAIQUE REHMAN, NOUHAD K. BASSILA, GEORGE BRECKENRIDGE, AND WILLIAM JEFFREY VAN FLEET,

Petitioners,

v.

DON EVANS, U.S. SECRETARY OF COMMERCE, AND KENNETH PREWITT, DIRECTOR OF THE UNITED STATES BUREAU OF THE CENSUS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Congress have constitutional authority under its decennial census power under Article I, Section 2, Clause 3 of the United States Constitution, as amended by the first sentence of Section 2 of the Fourteenth Amendment, to require, under penalty of law, that the lawful inhabitants of the states answer questions unrelated to the apportionment purposes stated in the enumerated power and on which the constitutionally-enumerated power to conduct a decennial census is expressly founded?

2. Does Congress have constitutional authority under the "Necessary and Proper Clause" of Article I, Section 8, Clause 18, in a decennial census, to require, under penalty of law, that the lawful inhabitants of the states answer questions unrelated to the apportionment purposes stated in the enumerated power and on which the constitutionally-enumerated power to conduct a decennial census is expressly founded?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Edgar Morales, Laique Rehman, Nouhad K. Bassila, George Breckenridge, and William Jeffrey Van Fleet, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the United States District Court for the Southern District of Texas upholding the constitutionality "of the forms used to conduct the decennial census for the year 2000" ("Census 2000").

OPINIONS BELOW

The United States District Court's decision upholding the constitutionality of the Census 2000 forms was entered on June 7, 2000 (App. 3a), and is reported at 116 F. Supp. 2d 801 (S.D. Tex. 2000). The unpublished decision of the United States Court of Appeals for the Fifth Circuit affirming "the judgment of the district court ... in all things" was entered on October 10, 2001, *sub nom.* Morales v. Evans. (App. 1a.)

JURISDICTION

The Court of Appeals entered its decision on October 10, 2001. This Court has jurisdiction under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the constitutional purpose and limitations of the enumerated power of Congress to conduct a decennial census pursuant to Article I, Section 2, Clause 3 of the United States Constitution (App. 44a), as amended by the first sentence of Section 2 of the Fourteenth Amendment (App. 46a), and the relationship of the "Necessary and Proper Clause" of Article I, Section 8, Clause 18 (App. 45a) to an exercise of the enumerated power of Congress to conduct such a census.

STATUTES AND REGULATIONS INVOLVED

This case also concerns the constitutionality of 13 U.S.C. Section 5, and related enforcement sections of the Census Act, 13 U.S.C. Section 1, *et seq.*, authorizing and requiring the gathering of data unrelated to the apportionment purpose set forth in Article I, Section 2, Clause 3 of the United States Constitution, of the questions contained in the forms developed and used by the Census Bureau in Census 2000 to elicit such data pursuant to 13 U.S.C. Section 5 (App. 47a), and of the criminal penalties authorized by Congress under 13 U.S.C. Section 221 (App. 48a) against any person who fails to answer such questions posed by Census 2000.

STATEMENT OF THE CASE

Census 2000 has been controversial from the start. Indeed, even before the census began, it pitted one branch of Congress against the U.S. Department of Commerce's "planned use of statistical sampling to determine the population for purposes of apportionment." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 320 (1999) ("Commerce Dept. v. U.S. House"). During the census, and continuing to this day, Census 2000 has also spawned a pitched battle over the Census Bureau's effort to elicit from American households extensive information that has nothing to do with apportionment of the House of Representatives. *See, e.g.*, "Judge Flip-flops on Census Finding," http://www.WorldNetDaily.com (June 18, 2000); "Census Breakdown: Citizens Tell Sam to Shove It Over Probing Questions; Will Pay Fine,"[1] http://www.drudgereport.com (March 15, 2000).

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[1] "Americans from coast to coast are expressing shock and outrage over the level of detailed questioning from the federal government and the 2000 Census, with thousands of citizens vowing to pay fines rather than submit to

In 1999, this Court resolved the first dispute in favor of the House of Representatives, ruling that, by statute, the American people must be counted one by one, not by some statistical procedure, for the purpose of apportioning representation in the lower house of Congress. Commerce Dept. v. U.S. House, *supra*, 525 U.S. at 343. In so ruling, this Court acknowledged that the current census law authorizes the statistical "gathering [of] supplemental, nonapportionment census information regarding population, unemployment, housing, and other matters" (*id.*, 525 U.S. at 336-37), but it was not asked to, and did not, pass on the constitutionality of including in the decennial census form questions adducing information for a nonapportionment purpose. This case presents that very question to this Court for resolution in what is believed to be a matter of first impression.

The five petitioners herein are citizens of the United States. Petitioners Edgar Morales, Laique Rehman, Nouhad K. Bassila and George Breckenridge received the Census 2000 "short form" questionnaire. Petitioner William Jeffrey Van Fleet received the "long form."[2] Certain questions on both questionnaires elicit the racial identity of the person receiving the questionnaire, as well as the racial identity of all other persons sharing the same living quarters. Certain questions asked on the "long form" questionnaire concern physical,

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the private nature of the inquisition, according to congressional sources...Census officials received more than 600,000 phone calls on Tuesday, according to officials. The majority of the callers lodged complaints about the probing nature of the census questions. And thousands of calls to Capitol Hill took staffers by surprise. 'It's a firestorm,' said one congressional aide...."

[2] Both census questionnaires are described in detail in the district court's decision below. Morales v. Daley, *supra*, 116 F. Supp. at 804-09. (App. 6a-18a.)

mental and emotional disabilities, military veteran status, occupational status, including details of the nature of the employment or work activity, the transportation used to get to and from work, and the level of income, and housing conditions, including details concerning the kind, value, and facilities available to the residents thereof. *See* Morales v. Daley, *supra,* 116 F. Supp. 2d at 804-09. (App. 6a-18A.) All of the petitioners were subject to prosecution for violation of 13 U.S.C. Section 221 for failure to answer any one or more questions posed in the questionnaires submitted to them.

In their complaint, petitioners objected to these and all other questions, "maintain[ing] that the only questions the government may lawfully compel answers to in connection with the census are questions that relate to the constitutionally-mandated enumeration or 'head count' ... for purposes of apportionment." *Id.*, 116 F. Supp. 2d at 803. (App. 5a.) In response, the Government, relying upon "the Necessary and Proper Clause of the Constitution, together with the clear language of Article I, Section 2, Clause 3, which gives to Congress the power to conduct the decennial census 'in such Manner as they shall by Law direct,'" maintained that "Congress [has] the authority to collect demographic information about the nation's population in order to enable Congress to exercise its delegated powers to govern that population intelligently." *Id.*, 116 F. Supp. 2d at 809-10. (App. 19a-20a.)

After observing "that from the first census, taken in 1790, the Congress has never performed a mere headcount, [having] always included additional data points, such as race, sex, and age of the persons counted," the district court accepted the Government's argument, quoting briefly from this Court's opinions in McCulloch v. Maryland, 17 U.S. 316, 324 (1819), and in the Legal Tender Cases, 79 U.S. 457 (1870), and

adopting wholesale the analysis of another federal district court in United States v. Moriarity, 106 Fed. 886, 891 (S.D.N.Y. 1901). Morales v. Daley, *supra,* 116 F. Supp. 2d at 809-10. (App. 19a-20a.)

The United States Court of Appeals for the Fifth Circuit, affirming the district court's judgment "in all things," summarily upheld the district court's ruling that Congress is vested with the legislative power to conduct a decennial census for purposes other than apportionment. Morales v. Evans, *supra* (October 10, 2001). (App. 1a-2a.)

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW ERRONEOUSLY ANALYZED AND RESOLVED AN IMPORTANT FEDERAL QUESTION CONCERNING THE NATURE AND SCOPE OF CONGRESS' ENUMERATED POWERS THAT SHOULD BE CORRECTED BY THIS COURT.

At stake in this case is whether the federal government is truly a government of enumerated powers, as stated in Article I, Section 1, of the United States Constitution, or instead, is a government of plenary power without regard to the express terms of the written document.

In this case, the courts below have given mere lip service to the fact that Congress possesses only those powers "delegated" to it by the United States Constitution. Both courts failed to examine the language of Article I, Section 2, Clause 3 (as amended by the first sentence of Section 2 of the Fourteenth Amendment) to ascertain whether the census provision authorizes Congress to conduct a decennial census

for purposes other than those stated in the constitutional text. Neither the district court nor the court of appeals even examined the constitutional text, the district court preferring to eschew any analysis of the language of Article I, Section 2, Clause 3 and the first sentence of Section 2 of the Fourteenth Amendment, in favor of a two-sentence review of census history, a summary of the Government's argument, and quotes from two court opinions, one decided in 1870 and the other in 1901. *Id.*, 116 F. Supp. 2d at 809-10. (App. 19a-20a.)

Just short of three years ago, this Court paid careful attention to the constitutional texts ignored by the courts below, referring to them as authoritative guideposts in seeking to ascertain whether Congress, in providing for Census 2000, had departed from its historic practice of counting the American people one-by-one. Commerce Dept. v. U.S. House, *supra*, 525 U.S. at 321, 346-49. In a separate opinion in the Commerce Dept. decision, Justice Scalia, joined by three other justices, concluded that "[f]or reasons of text and tradition, fully compatible with a constitutional purpose that is entirely sensible, a strong case can be made that an apportionment census conducted with the use of 'sampling techniques' is not the 'actual Enumeration' that the Constitution requires." *Id.*, 525 U.S. at 349. If Congress' choice of **means** by which a decennial census may be conducted **is limited** by the express constitutional requirement of an "actual Enumeration," then surely the "**Manner**" of a decennial census **ought to be limited** by the express constitutional purpose of apportionment of "Representatives and direct taxes."

According to the courts below, however, there is no constitutional limitation upon the federal government's right to elicit from the American people economic and other data because such information could possibly be helpful to ensure "'the intelligent action of the general government.'" Morales

v. Daley, *supra*, 116 F. Supp. 2d at 810. (App. 20a.) Contrarily, in two recent cases, this Court has ruled that solely because conduct may impact the nation's economy does not justify the use of congressional power to regulate interstate commerce for the purposes of policing that conduct. United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000). In these rulings, this Court has reaffirmed that the government of the United States is still a government of enumerated powers.

Because the congressional power to conduct a decennial census is an enumerated power, both the purpose and manner by which that power is exercised are governed by the specific terms of that grant of the enumerated power, and not by the Necessary and Proper Clause. *Compare* Gibbons v. Ogden, 22 U.S. 1 (1824) *with* McCulloch v. Maryland, 17 U.S. 361 (1819). Although the district court below purported to rely upon the McCulloch case, it disregarded Chief Justice Marshall's admonition in that case that the Necessary and Proper Clause may be invoked only in support of a congressional program not specifically authorized by any enumerated power. Such is not the case when Congress conducts its decennial census, an enumerated power governed by the terms and conditions placed upon that power in the text of Article I, Section 2, Clause 3 of the Constitution, as amended by the first sentence of Section 2 of the Fourteenth Amendment.

Had the courts below properly followed the constitutional text, and correctly applied the McCulloch test, they would have found that all of the questions, other than those directly related to apportionment, in Census 2000's short and long form questionnaires are beyond the authority of Congress, and thus, outside of its power to coerce answers thereto by the enactment and enforcement of criminal sanctions.

Because (1) petitioners are still subject to criminal prosecution under 13 U.S.C. Section 221(a) for not answering all questions on the census forms, (2) petitioners are "person[s] aggrieved by the use of any statistical method in violation of the Constitution ... in connection with the 2000 or any later decennial census, to determine the population for purposes of apportionment or redistricting Members in Congress" under P.L. 105-119, 111 Stat. 2480, sec. 209(b) (Nov. 26, 1997) (App. 49a.), and (3) Census 2010 will most likely continue this aggrandizement of power, this Court should accept this petition to resolve this important question of constitutional authority.

II. THE DECISIONS BELOW CONFLICT WITH THE CONSTITUTIONAL PRINCIPLES UNDERLYING BOTH DEPARTMENT OF COMMERCE v. U.S. HOUSE OF REPRESENTATIVES AND THE CONSTITUTIONALLY-MANDATED PURPOSE OF THE CENSUS POWER.

A. The Original Purpose of the Census Clause.

The courts below ignored the text of the constitutionally-enumerated census power as though the purposes stated are of no consequence. To the contrary, the apportionment purposes stated therein were, and continue to be, of constitutional significance.

There is no question that the original purpose of the decennial census authorized by Article 1, Section 2, Clause 3 of the United States Constitution was the apportionment of the nation's population, state-by-state, for the dual purposes of ascertaining the number of each state's representatives in the House of Representatives and the proportion of direct taxes to

be paid by the people of each state.[3] This two-fold purpose of apportionment was carefully balanced, designed to insure as accurate an enumeration as humanly possible. As James Madison explained in *Federalist 54*:

> [T]he establishment of a common measure for representation and taxation ... will have a very salutary effect. As the accuracy of the census to be obtained by the congress, will necessarily depend, in considerable degree, on the disposition, if not the co-operation of the states, it is of great importance that the states should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the states will have opposite interests, which will control and balance each other, and produce the requisite impartiality. [*Federalist No. 54* as reprinted in A. HAMILTON, J. MADISON, J. JAY, THE FEDERALIST 286 (G. Carey & J. McClellan, eds., Liberty Fund, Indianapolis: 2001].

Joseph Story echoed Madison's view that "representation and taxation might go *pari passu*" on the basis of the decennial

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[3] *See, e.g.*, T. Bradshaw, "Death, Taxes, and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy," 64 GEO. WASH. L. REV. 379, 384 (1996); S. Stansbury, "Making Sense of the Census: The Decennial Census Debate and its Meaning for America's Ethnic and Racial Minorities," 31 COLUM. HUMAN RIGHTS L. REV. 403, 406-07 (2000) (hereinafter "Making Sense of the Census").

census, finding ample support in the record of the constitutional proceedings. I J. STORY, COMMENTARIES ON THE CONSTITUTION Section 642, n.2 (5th ed. 1891). Story noted, however, that in the first 40 years of the American republic, only three direct taxes had been levied. Armed with such hindsight, Story expressed doubts about the efficacy of pairing the "levy of direct taxes" which is "occasional and rare" as a fulcrum to counterbalance the "principle of representation" which is "constant and uniform." *Id.*, at Section 642. Nonetheless, Story acknowledged that, in forming the Union, linking both representation and direct taxation to the decennial census played a crucial role; thus, he urged continued adherence to it "for the common good." *Id.*, at Section 643.

Even after the abolition of slavery and the three-fifths rule, this Court, finding that a tax on income from real estate was a direct tax, recognized the continuing vitality of the compromise embodied in Article I, Section 2, Clause 3, "providing that as between State and State [direct taxation] should be proportioned to representation." Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429, 564 (1895). In doing so, it expressly reaffirmed Madison's view that the constitutional wedding of representation in the House to direct taxation "would produce impartiality in enumeration." *Id.*, 157 U.S. at 564.

B. The Continuing Relevance of the Original Purpose.

With the ratification of the Sixteenth Amendment in 1913, permitting a federal income tax without apportionment among the states, and the consequent reliance of the federal government upon the income tax as a primary source of revenue, there ended the disincentive of an increase in federal taxes to curb the natural incentive to overinflate a state's population in an effort to enhance the number of its representatives in the House. But the passage of the Sixteenth

Amendment does not mean that the original constitutional purpose of obtaining as accurate an enumeration of each state's population has been abandoned. To the contrary, it means that this Court should be **even more** vigilant to ensure that Congress does not manipulate the decennial census in order to distort the representation formula of the House of Representatives set forth in Article I, Section 2, Clause 3.

To accomplish this task, Congress should be required to adhere to the constitutional text. As Justice Scalia pointed out in his Separate Opinion in the earlier Census 2000 case, Congress should not be permitted to depart from the requirement of an "actual Enumeration" of the American people "under the guise of regulating the "Manner" by which the census is taken, to select among various estimation techniques having credible (or even incredible) 'expert' support," lest such flexibility "give to the party controlling Congress power to distort representation in its own favor." Commerce Dept. v. U.S. House, *supra,* 525 U.S. at 348. Hence, he concluded that "genuine enumeration may not be the most accurate way of determining population, but it may be the most accurate way of determining population with the minimum possibility of partisan manipulation." *Id.*, 525 U.S. at 348-49.

Justice Scalia's reasoning for sticking to an enumeration by a head-to-head count, rather than statistical sampling, applies equally to the addition of questions concerning race. Information gathered by the decennial census's questions about racial identity has become "the primary source for state governments when drawing voting districts." S. Stansbury, "Making Sense of the Census," *supra*, 31 COLUM. HUMAN RIGHTS L. REV. at 404-05. As the primary source, such census

data has been utilized by state legislatures[4] for the "partisan manipulation"of Congressional districts, even when such manipulation does not rise to an unconstitutional misuse of race in the process. *See* Hunt v. Cromartie, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that most loyal Democrats happen to be black Democrats and even if the States were *conscious* of that fact." (emphasis in original))[5]

Finally, questions concerning race, disability, employment and housing conditions carry with them the incentive to exaggerate certain population numbers in order to enlarge the amount of federal largesse coming into a particular state or local community under a myriad of federal programs.[6] Indeed, they have skewed the Census Bureau's promotion of the decennial census away from its primary purpose of apportionment of each state's representatives in the House.

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[4] Sometimes state legislatures have been aided by the United States Department of Justice. *See* Miller v. Johnson, 515 U.S. 900, 909-10 (1995).

[5] Questions eliciting information about race, along with disabilities, employment and housing conditions, may pose another danger of partisan manipulation, that of distribution of federal funds. *Cf.* Rutan v. Republican Party, 497 U.S. 62, 91 (1990) (Stevens, J., concurring) ("It seems to be obvious that the government may not discriminate against particular individuals in hopes of advancing partisan interests through the misuse of public funds.")

[6] Federal spending programs for which "census data" are sought include education grants, public assistance of the poor and other social services, job training for the unemployed, housing assistance, subsidies and mortgage insurance, urban development grants, public transportation and other services to the disabled and elderly, and Medicare and Medicaid subsidies. "Census Flap Intensifies: Director Pleads for Compliance," Washington Post, March 31, 2000, p. 1.

In the conduct of Census 2000, the Census Bureau's official cover letter[7] sent to millions of American households actually suggested that, "more important" than determining the number of representatives, completing the Census 2000 questionnaire determined whether "your neighborhood" will receive all the "government money" to which it is entitled:

> This is your official form for the United States Census. It is used to count every person living in this house or apartment — people of all ages, citizens and non-citizens. Your answers are important. First the number of representatives each state has in Congress depends upon the number of people living in the state. The second reason may be **more important to you and your community**. The amount of government money your neighborhood receives depends on your answers. That money gets used for schools, employment services, housing assistance, roads, services for children and the elderly, and many other local needs. (Emphasis added.) [Quoted from http://www.velasquez.com/congress (March 26, 2000)].

Amazingly, neither the short nor the long form questionnaires even mentioned the constitutional apportionment purpose of Census 2000; rather, at the top of each form appeared the following statement:

> This is the official form for all the people at this address. It is quick and easy, and your answers are protected by law. Complete the Census and help your community get what it needs — today and in the

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[7] A copy of this letter was attached as Exhibit C to petitioners' Amended Complaint in the district court.

future! [United States Census 2000 Forms D-61A and 61B].[8]

Furthermore, the Census Bureau engaged in a vigorous campaign, urging principals of the nation's primary and secondary schools to "help make sure everyone is counted in Census 2000" as their "opportunity — and responsibility — to help make sure your school and the children in your community to get what they need." Letter from Kenneth Prewitt, United States Department of Commerce, Bureau of the Census to "Principal" http://scoe.net/features/census2000/schools.html. Included in the packet sent to the school principals was a form letter to be filled out by each student in the school, at the direction of the teachers, addressed to "his or her parent or guardian," with instructions to take it home. The letter stated:

> By counting all the people in every state, America learns what America needs. An accurate count can mean our community gets its fair share of funding for education, health care, transportation, and job training. That could mean more dollars for schools and playgrounds, or a new hospital or bus line. If we miss people, our community may not get all the money it deserves. [http://scoe.net/features/census2000/schools.html.]

Given such "encouragements," the Census Bureau fed a natural tendency of a head of household to overcount the number of people residing there in order to get their and their neighbors' "just deserts." Instead of tying **federal taxation** to the decennial census as a **disincentive** to exaggerating

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[8] Both census questionnaires were attached to petitioners' Amended Complaint in the district court as Exhibits A and B, respectively.

population, as provided for in the original constitutional text, modern Congresses have tied the census to **federal spending**, which operates as an **incentive** to inflate the headcount in order to obtain more federal funds to one's state and local community. Thus, by authorizing the inclusion of questions irrelevant to providing an accurate headcount, Congress has undermined the original structure of "impartiality" that Madison and his fellow constitution drafters envisioned.

Fidelity to the constitutional text, limiting questions exclusively to obtaining an accurate headcount, can best preserve the constitutional object of an "actual enumeration" for the purpose of establishing the number of representatives to which each state is entitled in the House of Representatives. The Census Bureau should be disabused of its promotional efforts keyed to federal spending, and instructed to achieve an accurate count to accomplish its apportionment purpose.

C. The "Manner" of the Census Must Be Relevant Only to the Apportionment Purpose.

The Government argued below that Congress may expand the objects of the decennial census to include data that is relevant to the exercise of its other delegated powers, because Article I, Section 2, Clause 3 states that Congress may conduct the census "in such Manner as they shall direct." *See* Morales v. Daley, *supra*, 116 F. Supp. 2d at 809-10. (App. 19a-20a.) But the constitutional grant of power over the "Manner" by which the decennial census is conducted cannot be twisted to empower Congress to change the constitutionally-defined purpose or object of that census.

By its plain language, Article I, Section 2, Clause 3 (as amended by the first sentence of Section 2 of the Fourteenth Amendment) authorizes Congress to conduct a decennial

census by an "**actual Enumeration**" of the nation's population, thereby limiting Congress' choice of "Manner" of that enumeration to "an actual counting, and not just an estimation of number." *Accord*, Commerce Dept. v. U.S. House, 525 U.S. at 347-48 (Scalia, J., Separate Opinion). In like manner, the plain language of the census provision, as modified by the Fourteenth Amendment, authorizes Congress to conduct a decennial census for the purpose of **apportionment of "Representatives and direct taxes**," thereby also limiting its choice of "Manner" of that census.

"[D]ictionaries roughly contemporaneous with the ratification of the Constitution demonstrate"[9] that "manner" means "form" or "method," not object or purpose. SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773); NOAH WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). Webster's 1828 dictionary also defines "manner" as the "way of performing or executing," or simply "way" or "mode." In contrast, the Webster dictionary defines "purpose" as "[t]hat which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, measure or exertion." Similarly, Johnson's 1773 dictionary defines purpose as "intention; design" and "to end desired." Both dictionaries define "object" as "that about which any power of faculty is employed."

In light of these definitions, the notion that, because Congress may choose the "Manner" of the decennial census, it may also select whatever purpose, object or end it chooses for

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[9] The language is Justice Scalia's in his Separate Opinion in Commerce Dept. v. U.S. House, *supra*, 525 U.S. at 347, where Justice Scalia looked to such dictionaries for guidance as to the usage of words in the constitutional text.

that census appears just as "incompatible" with the constitutional text as the idea that Congress may conduct an "actual Enumeration" of the American people by whatever counting method it chooses, such as "with gross statistical estimates." *See* Commerce Dept. v. U.S. House, *supra*, 525 U.S. at 347 (Scalia, J., separate opinion).

According to the text, then, the decennial census has as its exclusive object the "actual enumeration" of the nation's population, state-by-state, for the sole purposes of apportionment of the House of Representatives and the levying of direct taxes. According to the district court opinion and the Government's argument below, a different result is dictated by "tradition." *See* Morales v. Daley, *supra*, 116 F. Supp. 2d at 809. (App. 19a.) A more careful look at the history of the early decennial censuses up to the ratification of the Fourteenth Amendment proves otherwise.

D. The Census Must Conform to the Fourteenth Amendment.

The district court below observed that even the earliest Congress "never performed a mere headcount," and even in first census, in 1790, "included additional data points, such as race, sex, and age of the persons counted." Morales v. Daley, *supra*, 116 F. Supp. 2d at 809. (App. 19a.) But a reading of the text of the first census law demonstrates that the age, sex and race questions asked in the 1790 census were designed to achieve the object of an "actual enumeration" of persons for the purpose of implementing the apportionment formula contained in Article I, Section 2, Clause 3. *See* "An Act providing for the enumeration of the Inhabitants of the United States," 1 Stat. 101 (1st Cong., 2d Sess. 1790) ("First Census Act").

With respect to the race question, the First Census Act was clearly influenced by the distinction drawn by the original Constitution between "free persons" and "all other persons." (App. 44a.) Only those in the first category were to be counted as "whole" persons, the others being counted only as "three-fifths." In an obvious attempt to guard against the temptation in the slave-holding states to overstate the number of "free persons," Congress required the enumerators to file a "Schedule of the whole Number of Persons," reporting family-by-family the number of "white males" over and under the age of sixteen and "white females," as distinguished from "other free persons" and "slaves." 1 Stat., *supra*, at 102 (Section 1). Thus, the "race" question was posed in "such Manner" as would be most conducive to the goal of achieving the constitutional object of counting free persons as whole persons and persons other than free persons as "three-fifths."

With respect to the sex and age questions, the First Census Act's requirements clearly were calculated to determine a person's place of residence in order that the "actual enumeration" reflect the population of each state, and not the nation as a whole. According to Section 5 of the First Census Act, a person's place of residence was determined by family identification, unless that person had a "settled place of residence" elsewhere. Both the sex and age of a person would be relevant to ascertain whether a person was living away from home, or whether that person was "occasionally absent at the time of the enumeration." *Id.* at 103 (Section 5). Additionally, with respect to the age question, the inquiry was designed to determine which family member or members were "obliged to render ... a true account, to the best of his or her knowledge, of all and every person belonging to such family ... on pain of forfeiting twenty dollars ...." *Id.* at 103 (Section 103).

This reading of the First Census Act is reinforced by its legislative history. James Madison, then a member of the House of Representatives, proposed that the bill be amended to provide for a substituted report schedule that would include, in addition to the race, sex and age data, information "specifying the number of persons employed in different professions, and arts, carried on within the United States; such as merchants, mechanics, manufacturers, etc., etc." P. KURLAND AND R. LERNER, 2 THE FOUNDERS' CONSTITUTION, pp. 139-140 (1987). In support of this proposal, Madison observed that the House "had now an opportunity of obtaining the most useful information for those who should hereafter be called upon to legislate for their country if this bill was extended so as to embrace some other objects besides the bare enumeration of the inhabitants...."[10] *Id.*

The House did not concur with Madison's proposal, leaving the report schedule intact, limited to its original purpose of actual enumeration according to the constitutional formula. Congress maintained essentially the same report schedule and rules for the second, through the fifth decennial censuses, adding only space for information of the "deaf and

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[10] Madison contended that such information, if "accurately known," would enable Congress to "proceed to make a proper provision for the agricultural, commercial and manufacturing interests," and he urged his fellow colleagues to take advantage of the first decennial census to obtain "[t]his kind of information ... all legislatures had wished for; but ... had never obtained in any country." P. KURLAND AND R. LERNER, 2 THE FOUNDERS' CONSTITUTION, pp. 139-140 (1987). Uncharacteristically, Madison did not ask first whether Congress had the constitutional authority to obtain such data by its power to conduct a decennial census. In the light of the experience of King David of Israel (II *Samuel* 24), however, any government official would be well-advised to ask the question of constitutional legitimacy before embarking upon a census, no matter how well-intentioned.

dumb" and the "blind" in the 1830 act. *See* 2 Stat. 11 (6th Cong., 1st Sess. 1800); 2 Stat. 564 (11th Cong., 2d Sess. 1810); 3 Stat. 548 (16th Cong., 1st Sess. 1820); 4 Stat. 383 (21st Cong., 1st Sess. 1830). Not until the sixth decennial census, did Congress delegate to the executive department authority to develop the forms necessary to conduct the census. 5 Stat. 331 (Section 13) (25th Cong., 3d Sess. 1839).

To be sure, in the third decennial census, Congress provided for the gathering of information on "the several manufacturing establishments and manufacturers," but such information was to be submitted on a report form separate from the form containing the enumeration of residents, and according to instructions of the Secretary of the Treasury, not the Secretary of State who was in charge of the enumeration. "An Act further to alter and amend 'an act providing for the third census or enumeration of the inhabitants of the United States,'" 2 Stat. 605 (11th Cong., 2d. Sess. 1810).

As the district court below noted, the government glossed over these important nuances in the conduct of the early decennial censuses:

> In the explanatory materials the Census Bureau has posted on its website, which were provided to the court in the exhibits to Defendants' Brief, the Census Bureau has stated the year in which each category of question was first asked in a census and has indicated the years in which categories of questions were dropped and picked up again in subsequent census efforts. **The Census Bureau does not reproduce the actual questions asked in past years.** [Morales v. Evans, *supra,* 116 F. Supp. 2d at 804, n.3 (emphasis added).] (App. 7a, n. 3.)

Had the government desired to provide full and accurate information on its website, it would have, for example, alerted the American people that while a "question concerning race has been asked on the census form since 1790," the question concerning race did not just differ in "the detail called for in the Year 2000 census form," but in purpose as well. The government's lack of candor on this point is understandable, given that the race question was first asked to ensure that no Negro slave would be counted as a whole person. Nevertheless, the government's failure is regrettable, especially in light of the fact that the decennial census contained a race question even after the ratification of the Fourteenth Amendment, which repealed the old three-fifths rule, and ratification of the Fifteenth Amendment, which prohibited the denial of the right to vote on account of race.

Congress, however, did not change its census practice, continuing to identify the American people by race, even during a period in American history when persons were denied the right to vote because of their race. The Census 2000 form not only continued this historic Congressional disregard of the specific language of Section 2 of the Fourteenth Amendment, but as the district court below observed, posed the race question in a "detail[ed] form" never before asked. Not only did question eight on the short form ask whether a person was "white" or "black, African American, or Negro," it also asked whether the person was "American Indian or Alaska native," with space to provide the name of the enrolled or principal tribe, "Asian Indian," "Chinese," "Filipino," "other Asian," with space to print the race, "Japanese," "Korean," "Vietnamese," "Native Hawaiian," "Guamanian or Chamorro," "Samoan," "other Pacific Islander," and a space to print the race and "some other race," with a space to print the name of the race. *Id.*, 116 F. Supp. 2d at 804-05. (App. 7a-8a.)

Additionally — and singled out for special treatment by a separate question, strategically placed before the general race question — persons were asked if they were of Spanish, Hispanic or Latino heritage, and further to identify themselves as "Mexican," "Mexican American," or "Chicano", "Puerto Rican," "Cuban," or "other Hispanic/Latino." *Id.*, 116 F. Supp. 2d at 804, 815. (App. 7a, 30a.)

By separating the race questions into two categories, the Census Bureau obviously did not have, as its purpose, the elicitation of answers to ensure an accurate enumeration, as had been the case when the race question was initially posed in 1790 and in the census years when race was arguably constitutionally relevant. By placing the question of Spanish/Hispanic/Latino heritage first, the Bureau clearly hoped to head off those of such origin from identifying themselves **only** as "white" or "black," which many would have done had the category been included in one comprehensive "race" question. Moreover, by posing the questions separately — indeed by posing the race questions at all, the Bureau risked an undercount, because many Americans, such as the petitioners here, strongly oppose having to identify themselves in any racial category — such classifications being "deeply abhorrent, personally, ethnically, and politically." *Id.*, 116 F. Supp. 2d at 815. (App. 30a.) With the risk of prosecution for not answering such questions,[11] many such Americans may have not responded at all to Census 2000.

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[11] Even some who did answer the questions expressed the same kind of outrage as the petitioners in this case. *See, e.g.*, http://foundingspirit.com/census2000/feedback.htm.

E. The Census Power Must Be Limited

In sum, the posing of questions irrelevant to the constitutionally-authorized purpose of apportionment conflicts with the "actual enumeration" principle embraced by this Court in Commerce Dept. v. U.S. House, *supra*, as well as the text and early tradition limiting the decennial census to the sole object of determining the apportionment of representatives in the House of Representatives and the levying of direct taxes.

III. THE DECISIONS BELOW CONFLICT WITH THE RULE OF McCULLOCH v. MARYLAND.

The district court neglected to engage in any analysis whatsoever of either the text or the history of the Congressional exercise of the census power. Instead, it used the Necessary and Proper Clause as a legal lever to pry Census 2000 away from Article I, Section 2, Clause 3 of the United States Constitution.

Relying upon this Court's estimable decision in McCulloch v. Maryland, *supra*, the district court apparently adopted the Government's argument "that the Necessary and Proper Clause of the Constitution, together with the clear language of Article I, Section 2, Clause 3, which gives to Congress the power to conduct the decennial census 'in such Manner as they shall by Law direct,' gives to Congress the authority to collect demographic information about the nation's population in order to enable Congress to exercise its delegated powers to govern that population intelligently." *See* Morales v. Daley, *supra*, 116 F. Supp. 2d at 809-10. (App. 19a-20a.) But that contention, which became the lower court's conclusion, rests upon a completely mistaken view, and dangerous misreading, of McCulloch.

In McCulloch, this Court addressed the question whether Congress had the authority "to incorporate a bank." *Id.*, 17 U.S. at 401. To answer that question, Chief Justice John Marshall first surveyed the enumerated powers, and concluded that "[a]mong the enumerated powers, we do not find that of establishing a bank or creating a corporation." *Id.*, 17 U.S. at 406. Only after concluding that these two powers were not among those enumerated in the Constitution, did the chief justice turn to the Necessary and Proper Clause, concluding that it "purports to be an additional power" for "carrying into Execution" powers otherwise enumerated, **not** to be substituted for a power otherwise enumerated. *Id.*, 17 U.S. at 420-422.

The Necessary and Proper Clause, the chief justice concluded, simply provided Congress with "discretion, with respect to the **means** by which the powers it confers are to be carried into execution," **not** discretion with respect to the objects or purposes of those enumerated powers. Instead, the legitimacy of the object of an enumerated power was to be determined by an examination of the enumerated power itself, and only those means "plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional."[12]

This understanding of McCulloch is reflected in Chief Justice Marshall's subsequent opinion in Gibbons v. Ogden, 22

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[12] This language is taken from one of Chief Justice Marshall's most famous constitutional tests, one often repeated, although sometimes misunderstood and misapplied: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*, 17 U.S. at 421.

U.S. 1 (1824). In Gibbons, the chief justice, in assessing the constitutionality of a federal statute licensing the coasting trade, asked first whether the regulation dealt with the **subject** of any enumerated power. After analyzing the meaning of "commerce" and "among the several states," he concluded that navigation on interstate commerce fit within the subject matter of "commerce among the several states." Having so determined that the regulation of navigation was governed by the enumerated power to regulate "commerce ... among the several states, the chief justice inquired whether the licensing statute fit within the constitutionally stated **object** of that enumerated power. Because the statute was designed to facilitate traffic of goods and services among the several states, the chief justice concluded that the statute fell within the enumerated power's "plenary" commercial object or purpose. *Id.*, 22 U.S. at 189-96, 212-17.

To further explain the nature of the objects or purposes encompassed by the Commerce Clause, Chief Justice Marshall distinguished certain other regulations impacting commerce, such as "inspection" and "quarantine" laws. These, he wrote, are not regulations of interstate commerce, because their objects or purposes were health and safety. Such objects, he noted, remained within the power of state governments as exercises of the police power, a power not enumerated as one conferred upon the federal government. *Id.*, 22 U.S. at 203-06.

In two recent cases, this Court has had occasion to apply this constitutional distinction to acts of Congress purportedly authorized by the enumerated power to regulate interstate commerce, but which in reality operated as exercises of the police power. In United States v. Lopez, 514 U.S. 549 (1995), this Court struck down the Gun-Free School Zones Act of 1990 on the ground that the connection between the presence of guns in schools and interstate commerce was so tenuous that to

uphold the act would be tantamount to ruling that the Constitution confers "a general federal police power." *Id.*, 514 U.S. at 563-67. Subsequently, this Court held that Congress had no authority under the Constitution's Commerce Clause to enact a law providing a federal civil remedy for victims of gender-motivated violence:

> [W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." [United States v. Morrison, 529 U.S. 618 (2000)].

Had the Court addressed the constitutional questions in Lopez and Morrison as ones governed by the Necessary and Proper Clause, it would have been set free from the commercial object or purpose governing the exercise of the power to regulate interstate commerce. After all, the "Necessary and Proper" Clause may be invoked on behalf of any "Power vested by this Constitution in the Government of the United States." Neither the majority nor the dissent in either case, however, saw fit to substitute that Clause for the Commerce Clause for the simple reason that, like Gibbons v. Ogden, and unlike McCulloch v. Maryland, the Court had discovered that the enumerated power to regulate interstate commerce governed the two cases. Thus, resort could not be had to the "additional power" contained in the Necessary and Proper Clause. McCulloch v. Maryland, *supra*, 17 U.S. at 420-21. Had the Court done otherwise in Lopez and Morrison, it would have been guilty of using the Necessary and Proper Clause to transform the federal government into a government of plenary government power.

Nevertheless, such an unconstitutional transformation is precisely what the decision below would attempt to bring about. In the name of the Necessary and Proper Clause, the district court explicitly affirmed the Government's contention that it may collect whatever demographic information it wishes in a decennial census "in order to enable Congress to exercise its delegated powers to govern [the nation's] population intelligently." *See* Morales v. Daley, *supra*, 116 F. Supp. 2d at 809-10. (App. 19a-20a.) There is, however, no enumerated power granted to the federal government to "govern" the people "intelligently." And, as the McCulloch test (see footnote 12 above) demonstrates, the Necessary and Proper Clause cannot be utilized to add any purpose beyond those "within the scope of the constitution," according to "the **letter** and the spirit of the constitution." Thus, that Clause may not be used to add new purposes to the express apportionment object of the enumerated decennial census power in Article I, Section 2, Clause 3, as amended by the first sentence of Section 2 of the Fourteenth Amendment.

Having loosed the Necessary and Proper Clause to override the enumerated power to conduct a decennial census, the district court embraced the notion that the federal government's role is unlimited. It found only one holding[13] to support this

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[13] To be sure, the district court also lifted a quote from the Legal Tender Cases, 79 U.S. 457, 536 (1870). [*See* Morales v. Daley, *supra*, 116 F. Supp. 2d at 809-10 (App. 19a-20a).] Not only is the quoted passage *obiter dicta*, but it is also devoid of analysis. Indeed, the quote ends in a rhetorical flourish, as if the answer to the question of congressional power is self-evident. Chief Justice Marshall did not think so, as his carefully reasoned opinion in Loughborough v. Blake, 18 U.S. (5 Wheat) 317 (1820), would have revealed to the courts below if they had seriously searched for a constitutionally sound assessment of the government's invocation of the Necessary and Proper Clause in this case.

novel proposition, an opinion of a trial judge in United States v. Moriarity, 106 Fed. 886 (S.D.N.Y. 1901), which stated:

> The functions vested in the national government authorize the obtainment of information demanded by ... the census act, and the exercise of the right befits an exalted and progressive sovereign power, enacting laws adapted to the needs of the vast and varied interests of the people, after acquiring detailed knowledge thereof. [*Id.*, 106 Fed. at 889.]

Such a promiscuous view of the powers of the federal government does violence to the constitutional schema of enumerated powers recently embraced by this Court in the Lopez and Morrison cases. As Chief Justice Rehnquist put it in Morrison, "[u]nder our written Constitution ... the limitation of congressional authority is not solely a matter of legislative grace." United States v. Morrison, *supra*, 529 U.S. at 616. Only by misinterpreting and misapplying the Necessary and Proper Clause could either the judge in Moriarity or the courts below have reached such an erroneous conclusion. It should not be permitted to stand.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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